



Serial No. 09/574,987; Navy Case No. 82408

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Petition

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:
CAROL A. BECKER
Serial No. 09/574,987
Filed: 12 May 2000

Examiner: Tran, T.
Art Unit: 1741

which is a division of parent:
Serial No. 09/137,008
Filed: 20 August 1998

FOR: VISIBLE LIGHT pH CHANGE FOR ACTIVATING POLYMERS AND OTHER pH
DEPENDENT REACTANTS

PETITION TO THE COMMISSIONER UNDER 37 CFR 1.144

Honorable Commissioner of Patents and Trademarks
Washington, DC 20231

Sir:

In response to the Office Action of 8 May 2001, the following petition is submitted.

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Statement of Facts:

On 17 April 2000, Petitioner requested that the Examiner reconsider a requirement for restriction. As required by 37 CFR 1.143, Applicant made a provisional election of claims for

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for prosecution in this request for reconsideration. All other claims were provisionally canceled.

In an Office Action of 8 May 2001, the request for reconsideration was refused. The basis for this refusal, is, as stated by the Examiner:

"Claims 4-6 and 23-24 have been canceled; therefore, Applicant's arguments with respect to the Restriction Requirement are moot."

Applicant considers all prerequisite acts for this petition to have been fulfilled. On 17 April 2001 Applicant made a proper request for reconsideration. This request resulted in a repeated action by the Examiner dated 8 May 2001.

The details of this restriction requirement will now be presented.

Reiteration of the Patent Office Restriction Requirement

The Examiner asserts that restriction to one of the following inventions is required by 35 U.S.C. 121:

- I. Claims 4-6, drawn to an apparatus, classified in class 422.
- II. Claims 7-14 and 27-33, drawn to an apparatus, classified in class 422, subclass 186.
- III. Claims 23 and 24, drawn to a method, classified in class 204, subclass 157.15.

Attached as an appendix to this petition is a copy of the claims in issue.

The Examiner has stated that the inventions are distinct, each from each other, in that the inventions of groups I, II, and III are unrelated and that these inventions have different functions.

Specifically, the Examiner indicates that:

Group I is an apparatus requiring a solution containing anthracene and not a polymer;
Group II is an apparatus requiring a solution of anthracene and a polymer in the solution;

and
Group III is a method not requiring a solution of anthracene and/or a polymer disposed in the solution.

The Examiner states that it would be a burden to search for the specifics for each group

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when they are not required for each group.

In addition, the Examiner states that the inventions of Group II and of the combination of Groups I and II are related as process and apparatus for its practice.

The Examiner refers to MPEP 806.05(e) where it is described how inventions are distinct if it can be shown that either:

(1) the process as claimed can be practiced by another materially different apparatus or by hand, or (2) the apparatus as claimed can be used for another and materially different process.

Here, the Examiner asserts that the process as claimed can be practiced by another materially different apparatus, such as one not requiring a solution containing anthracene and/or a polymer in the solution.

The Examiner indicates that the inventions are distinct for these reasons and that because the search required for Groups I and II is not required for Group III, restriction is proper.

In addition, the Examiner states that because the inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction as indicated is proper.

Points to be Reviewed

- I. Is the restriction requirement proper?

Argument

In response to the restriction requirement, Applicant traversed the requirement.

Applicant provisionally canceled claims 4-6 and 23-24 (Groups I and III) and provisionally elected the invention described by remaining claims 7-14 and 27-33 (Group II).

The Manual of Patent Examining Procedure (MPEP) section 803 states that:

"If the search and examination of an entire application can be made without **serious burden**, the examiner must examine it on the merits, even though it includes claims to independent or distinct inventions." (bold added)

Claim 7, the independent claim of the provisionally elected Group II claims, includes the following elements:

CLAIM 7

An apparatus comprising:

- a solution containing anthracene;
- a polymer disposed in said solution, said polymer having the characteristic of changing its volume in response to a change in pH; and
- a source of visible light for irradiating said solution with light of a wavelength and of an intensity to establish a pH change in said solution so that when said solution is irradiated with said visible light said polymer undergoes a change in volume.

Group I's provisionally non-elected independent claim 4 contains the following elements:

CLAIM 4

An apparatus comprising:

- a solution containing anthracene; and
 - a source of visible light
- in which said source of visible light is used to irradiate said solution at a wavelength and of an intensity to establish a pH change in said solution.

Group III's provisionally non-elected independent claim 23 contains the following:

CLAIM 23

A method comprising:

- forming a solution of a compound that exhibits a change in pH upon irradiation with visible light; and
- changing said pH in said solution by irradiating said compound with said visible light so that said compound is elevated from a ground state energy level to a higher singlet state energy level to a triplet state energy level.

Applicant asserts that, in order for the responsibilities of the patent application examination process to be fulfilled, a complete examination corresponding to the provisionally elected Claim 7 and its dependent claims must be made.

This examination compels an examination of **all** of the elements of provisionally **non-elected** independent claims 4 and 23 as well as the claims dependent thereon.

For this reason, Applicant asserts that no reasonable person could find a serious burden imposed upon the Examiner by searching and examining the entire application including all of

the claims cited.

The Examiner has indicated that the inventions of Groups I, II and III are distinct from each other as they are unrelated. MPEP sections 806.04 and 808.01 are cited by the Examiner wherein it is asserted to be indicated that:

"Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects."

In the instant case, the Examiner asserts that the inventions have different functions. No assertion is made however that the inventions are "not disclosed as capable of use together".

As indicated earlier, the MPEP points out that even if an application includes claims that are independent or distinct, the search and examination of the application must present a serious burden to the Examiner. As Applicant stated above, no such burden is apparent.

The Examiner indicates that the claim limitations are different from each other and are not required for each of the groups. At the onset, it is a requirement of U.S. patent law that claims differ from each other. Otherwise they are subject to being rejected on the basis of multiplicity or what technically means "redundancy of claiming the invention".

The Examiner asserts that it will be a burden to search for the specifics for each group "when they are not even required for each Group". This may very well be a burden, but Applicant asserts that this burden is well within the scope of the thorough and complete examination due Applicant.

Though it is a matter of degree, the MPEP requires that an Examiner show that a **serious burden** will be imposed should they fully search and examine the application. As previously

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stated, Applicant fails to see how such a "serious" burden will be created. Properly searching and examining the provisionally elected Group II claims **will require** a search of all of the elements of the remaining Group I and III claims.

To further illustrate distinctness, the Examiner categorizes the inventions of Group III and the combination of Groups I and II as process and apparatus for its practice. Here, the Examiner cites MPEP section 806.05(e), wherein the following is contained:

"The inventions can be shown to be distinct if it can be shown that ... (1) the process as claimed can be practiced by another materially different apparatus....".

For reasoning, the Examiner states that the process as claimed can be practiced by another materially different apparatus such as one **not** containing an anthracene solution or anthracene solution with a polymer disposed in it.

MPEP section 806.05(e) states that:

"The burden is upon the examiner to cite reasonable examples that recite material differences."

Applicant asserts that the Examiner has not set forth a reasonable example. Applicant considers the cited MPEP section to be one requiring the setting forth a positive example versus a negative, in other words, providing an example of a materially different apparatus that can be used to practice the claimed process. None was given.

The Examiner indicates that the inventions are distinct for the reasons given above and because the search required for the combination of Groups I and II is not required for Group III.

Assuming that this reasoning is correct, it implies that at least Groups I and II deserve single group standing.

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Finally, the Examiner indicates that "Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper."

While Applicant recognizes the above quote to be largely a "form" paragraph, its statement is drawn from conclusive reasoning. In describing related inventions, MPEP section 808.02 under the category of "separate status in the art" provides the following:

"Even though they are classified together each subject can be shown to have formed a separate subject for inventive effort when an explanation indicates a recognition of separate inventive effort by inventors. Separate status in the art may be shown by citing patents which are evidence of such separate status and also of a separate field of search."

Applicant asserts that this evidence has not been brought forward.

Action Requested

As described in the above argument, Applicant asserts that the requirement for restriction is improper. It is therefore respectfully requested that the Examiner be directed to withdraw this requirement.

Any inquiry concerning this case should be directed to Applicant's attorney, Mr. Peter Lipovsky at (619) 553-3824.

Respectfully submitted,

by



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Registration No. 32,580
Attorney for Applicant

Serial No. 09/574,987; Navy Case No. 82408

19 July 2001
Commanding Officer
Attention: Peter A. Lipovsky
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APPENDIX

What is claimed is:

1 4. An apparatus comprising:

2 a solution containing anthracene; and

3 a source of visible light

4 in which said source of visible light is used to irradiate said solution at a wavelength and of an
5 intensity to establish a pH change in said solution.

1 5. The apparatus of claim 4 in which said anthracene is in its protonated form.

1 6. The apparatus of claim 5 in which said irradiation excites said anthracene to emit
2 phosphorescence.

1 7. An apparatus comprising:

2 a solution containing anthracene;

3 a polymer disposed in said solution, said polymer having the characteristic of changing its
4 volume in response to a change in pH; and

5 a source of visible light for irradiating said solution with light of a wavelength and of an
6 intensity to establish a pH change in said solution so that when said solution is irradiated with
7 said visible light said polymer undergoes a change in volume.

1 8. The apparatus of claim 7 in which said polymer is a polyelectrolyte fiber.

1 9. The apparatus of claim 8 in which said polyelectrolyte fiber is polyacrylic acid-polyvinyl
2 alcohol (PAA-PVA).

1 10. The apparatus of claim 9 in which said pH change in said solution is within plus or minus 1
2 pH value of a null point pH value of said polyelectrolyte fiber.

1 11. The apparatus of claim 7 in which said polymer is a polymer gel.

1 12. The apparatus of claim 11 in which said polymer gel is an acrylamide gel.

1 13. The apparatus of claim 12 in which said pH change in said solution is within plus or minus
2 1 pH value of a null point pH value of said polymer gel.

1 14. The apparatus of claim 7 in which said anthracene is in its protonated form.

1 23. A method comprising:

2 forming a solution of a compound that exhibits a change in pH upon irradiation with

3 visible light; and

4 changing said pH in said solution by irradiating said compound with said visible light so

5 that said compound is elevated from a ground state energy level to a higher singlet state energy
6 level to a triplet state energy level.

1 24. A method according to claim 23 in which said pH change exists for at least one millisecond.

1 27. The apparatus of claim 7 wherein said anthracene is in its protonated form.

1 28. The apparatus of claim 27 in which said polymer is a polyelectrolyte fiber.

1 29. The apparatus of claim 28 in which said polyelectrolyte fiber is polyacrylic acid-polyvinyl
2 alcohol (PAA-PVA).

1 30. The apparatus of claim 29 in which said pH change in said solution is within plus or minus 1
2 pH value of a null point pH value of said polyelectrolyte fiber.

1 31. The apparatus of claim 7 in which said polymer is a polymer gel.

1 32. The apparatus of claim 31 in which said polymer gel is an acrylamide gel.

1 33. The apparatus of claim 32 in which said pH change in said solution is within plus or minus
2 1 pH value of a null point pH value of said polymer gel.



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TRANSMITTAL FORM <small>(to be used for all correspondence after initial filing)</small>	Application Number	09/574,987 ✓	
	Filing Date	12 May 2000 ✓	
	First Named Inventor	Carol A. Becker	
	Group Art Unit	1741	
	Examiner Name	T. Tran	
Total Number of Pages in This Submission	13	Attorney Docket Number	82408

ENCLOSURES (check all that apply)		
<input type="checkbox"/> Fee Transmittal Form	<input type="checkbox"/> Assignment Papers (for an Application)	<input type="checkbox"/> After Allowance Communication to Group
<input type="checkbox"/> Fee Attached	<input type="checkbox"/> Drawing(s)	<input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences
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PETITION ROUTING SLIP

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Complete if Known

Application Number	09/574,987
Filing Date	12 May 2000
First Named Inventor	Carol A. Becker
Group Art Unit	1741
Examiner Name	T. Tran
Attorney Docket Number	82408

☐ PETITIONS DECIDED BY PETITIONS OFFICE

- 301 Relating to Public Use Proceedings (37 CFR 1.102)
- 302 To make application special - prospective manufacture (37 CFR 1.102, MPEP 708.02)
- 303 To make special - infringement (37 CFR 1.102, MPEP 708.02)
- 304 Relating to the Filing/Issuance of Defensive Issues (37 CFR 1.137)
- 305 To waive or suspend rules (37 CFR 1.133)
- 306 To express a paper from patent application or patent file (37 CFR 1.59)
- 307 Withdrawal of Attorney (37 CFR 1.56)
- 308 For access to application except re proceedings before Board (37 CFR 1.14, MPEP 103.504)
- 309 Relating to Small Entity (37 CFR 1.20)
- 310 Relating to reexamination (37 CFR 1.181-1.183)
- 311 For correction of inventorship for applications - no filing date (37 CFR 1.48)
- 312 For correction of inventorship re PCT applications (37 CFR 1.48)
- 313 For filing application without one or more inventors (37 CFR 1.41)
- 314 For filing PCT application without one or more inventors (37 CFR 1.47)
- 315 For extension of time without fee in cases in Application Division (37 CFR 1.136(b))
- 399 For matters before AIC for Patents - not specified
- 404 Relating to a filing date under 35 USC 118 (37 CFR 1.53)
- 411 Filing date for application filed by Express Mail (37 CFR 1.10)
- 412 Filing date for lost application
- 501 To waive an abandoned application - unavoidable delay (37 CFR 1.137(a))
- 502 To waive an abandoned application - unintentional abandonment (37 CFR 1.137(b))

- 503 To waive/suspend rules (37 CFR 1.183)
- 504 To involve supervisory authority - re patent examining operations (37 CFR 1.181)
- 505 To withdraw from issue after payment of issue fee (37 CFR 1.313(b)(4))
- 506 To withdraw from issue after payment of issue fee (37 CFR 1.313(b)(5)) or abandon application in favor of continuing application
- 507 To enter priority papers after issue fee payment (37 CFR 1.550(f))
- 508 To obtain a patent (37 CFR 1.214)
- 509 To involve supervisory authority - re Office of Admin. (37 CFR 1.181)
- 510 To waive/suspend rules re patent matters in Office of Admin. (37 CFR 1.183)
- 511 To decide mature subject matter for Patents under 37 CFR 1.182
- 512 To review refusal to accept a record maintenance fee - application filed on or after 8/27/82 (37 CFR 1.377)
- 523 To issue patent in the name of the Assignee (37 CFR 1.334(c))
- 525 To withdraw a holding of abandonment (37 CFR 1.181)
- 526 To enter a Commissioner Initiated Reexamination proceeding (37 CFR 1.520)
- 527 To convert Provisional Application
- 528 To reinstate abandoned Provisional Application
- 530 PCT person-unavailable
- 531 PCT person-unavailable
- 533 To accept unavoidably delayed payment of maintenance fee (37 CFR 1.379 (b))
- 535 To accept unintentionally delayed payment of maintenance fee (37 CFR 1.379 (c))
- 536 Petitions related to reexamination proceeding
- 599 For matters before the Deputy AIC for Patents - not specified

☒ PETITIONS DECIDED BY THE GROUP DIRECTOR

- 601 To make application special on ground of age or health (37 CFR 1.102, MPEP 708.02)
- 602 To make special - continuity of earlier application (37 CFR 1.102, MPEP 708.02)
- 603 To make special - environment quality program (37 CFR 1.102, MPEP 708.02)
- 604 To make special - accelerated examination (37 CFR 1.102, MPEP 708.02)
- 605 To make special - Energy Program (37 CFR 1.102, MPEP 708.02)
- 606 To make special - Reclaiming DNA (37 CFR 1.102, MPEP 708.02)
- 607 To make special for reasons not provided for in codes 601-606 (37 CFR 1.102, MPEP 708.02)
- 608 To request prosecution after Board decision (37 CFR 1.136)
- 609 For review of final refusal or requirement (37 CFR 1.144)
- 610 Involving Authority of Commissioner under 37 CFR 1.181 not specified in codes
- 611 Relating to the premature refusal of final rejection (37 CFR 1.181, MPEP 708.02)
- 612 Relating to the refusal to enter an amendment (37 CFR 1.181, MPEP 708.02)
- 714 To
- 813 To withdraw holding of abandonment (37 CFR 1.137, MPEP 711.03)
- 814 Relating to a requirement to cancel new matter from application (37 CFR 1.181)
- 815 MPEP 608.04(c)
- 816 Relating to formal opposition/proponency of affidavits (37 CFR 1.131, 1.132, 1.603, MPEP 715.07)
- 817 To institute an interference (37 CFR 1.606)
- 818 Relating to refusal to enter an amendment under 37 CFR 1.312

- 819 For concurrent Ex parte and inter partes proceedings (37 CFR 1.212)
- 819 For return of original copy of patent application (MPEP 604.04)
- 820 For extension of time (37 CFR 1.136(b))
- 821 For interview after Notice of Allowance mailed (MPEP 711.03)
- 822 Concerning appeal application before transfer of jurisdiction to Board (MPEP 1200)
- 823 For second or subsequent suspension of action (37 CFR 1.103, MPEP 708.02)
- 824 To request Appeals dismissed in Group
- 825 From denial of reexamination request (37 CFR 1.555(e))
- 826 To enter an amendment after payment of issue fee (37 CFR 1.313(b))
- 827 From refusal to issue a Certificate of Correction (37 CFR 1.181, MPEP 1450-1460)
- 828 For withdrawal of attorney from application pending in group (37 CFR 1.36)
- 829 For extension of time in a reexamination (37 CFR 1.550(c))
- 830 For foreign multiple reexamination proceedings (37 CFR 1.550(d), MPEP 2233)
- 831 To effect a second conversion of inventorship (37 CFR 1.181, MPEP 201.23)
- 832 Nonconformity
- 833 To correct inventorship in a patent not in interference (37 CFR 1.324, MPEP 1481)
- 834 To change inventorship in an application (37 CFR 1.48)
- 835 To change inventorship in a patent (37 CFR 1.48)
- 837 To withdraw from issue before payment of issue fee (37 CFR 1.313(b))
- 899 For matters before Group Director - not specified

☐ PETITIONS DECIDED BY BOARD OF PATENT APPEALS AND INTERFERENCES

- 701 To exercise supervisory authority over an examiner/examiner-in-chief (37 CFR 1.644)
- 702 To extend/abandon/ file copies of interference settlement agreements (35 USC 712, 135(c), 37 CFR 1.650(c))
- 703 For withdrawal of application in proceeding under 37 CFR 1.201 - 1.203 (37 CFR 1.136)
- 704 To access to a settlement agreement under 35 USC 135(c) (37 CFR 1.660(b))
- 705 For access to an application in proceedings before the Board (37 CFR 1.140)
- 706 From a refusal to issue a Certificate of Correction (37 CFR 1.322, 1.323)
- 707 To correct errors in inventorship (37 CFR 1.324)
- 708 To correct errors in inventorship (37 CFR 1.140) (37 CFR 1.136)
- 709 For matters before the Board special (37 CFR 1.136)
- 710 For extension of time to file supplemental Reply Brief (37 CFR 1.136)

- 711 To assign particular members to hearing or to request augmented panel (35 USC 712)
- 712 To decide miscellaneous questions in proceedings under 37 CFR 1.201-1.203
- 713 To decide priority papers in proceedings in interference (37 CFR 1.644)
- 714 Transmittal an Appeal
- 715 For matters before the Chairman of Board - not specified
- 716 To make an application before the Board special (37 CFR 1.102)
- 717 To institute an Appeal
- 718 To extend (suspend) proceedings (37 CFR 1.195, 1.197, 1.304)
- 719 To extend (suspend) proceedings (37 CFR 1.195, 1.197, 1.304)
- 804 For extension of time to file supplemental Reply Brief (37 CFR 1.136)
- 805 To request late request for an Oral Hearing (37 CFR 1.136)
- 899 For matters before the Clerk of the Board - not specified

☐ PETITIONS DECIDED BY SPECIAL LAWS (SECURITY AND GOVERNMENT INTEREST MATTERS)

- 901 Under 42 USC 2182
- 902 Under 42 USC 2437
- 903 Under 35 USC 184

- 904 Under 35 USC 267
- 905 To consider new security or Government interest matters - not specified

☐ PETITIONS DECIDED BY THE SOLICITOR

- 951 Petitions for extension of time in court matters 35 USC 142, 145, 146
- 952 Petitions relating to a party questions in cases before the Court of Appeals for the Federal Circuit

- 953 Requests filed under the Freedom of Information Act
- 959 Not specified

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